

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

United Federation of Churches, LLC (dba
“The Satanic Temple”),) No. 2:20-cv-00509-RAJ
Plaintiff,) PLAINTIFF’S RESPONSE IN
v.) OPPOSITION TO DEFENDANTS’
David Alan Johnson (aka “ADJ”), Leah) MOTION TO DISMISS SECOND
Fishbaugh, Mickey Meeham, and Nathan) AMENDED COMPLAINT
Sullivan,)
Defendants.)

I. Introduction

United Federation of Churches, LLC (dba “The Satanic Temple”) (“TST”), by and through counsel of record, files this response in objection to Defendants’ Motion to Dismiss Second Amended Complaint (“Motion”) (Dkt. # 27). This case is predicated on a simple moral proposition: you can’t hack someone else’s social media accounts to advertise competing goods and services and you can’t retain membership records for an organization to which you no longer belong. Defendants did precisely that, which caused TST to lose members and public goodwill.

Defendants incurred liability under the CFAA. As clarified by the Second Amended Complaint for Damages and Injunctive Relief (“SAC”), the Chapterhead removed Defendants’ administrative access to the Chapter page *before* they hacked the Chapter page. That corrected

1 the defect of the original complaint, so Defendants' Motion should be denied.

2 Defendants also incurred liability for tortious interference. The flaw of the original
 3 complaint was that it did not address that the interference was wrongful beyond the interference,
 4 itself. The SAC corrects this by clarifying that Defendants hacked TST's social media presence,
 5 had malicious intent, and engaged in unfair competition, all to diminish TST's donation base and
 6 divert it to Defendants' competitor organization.
 7

8 Defendants also incurred liability for trespass to chattels and conversion. TST had a
 9 superior possessory interest to the computer systems, and has a superior ownership interest in
 10 TST's membership records. Defendants' Motion is predicated on a non-existent requirement that
 11 a plaintiff demand the return of his property before the retention is actionable.
 12

13 Last, Defendants incurred liability for trademark dilution. TST has a protectible interest
 14 in having its mark not to be used to advertise a competitor's goods and services. Defendants
 15 incurred dilution by blurring liability when they stole TST's Allies page and used it to advertise
 16 Defendants' competitor goods and services. This diminished "TST" as a unique identifier of
 17 TST's goods and services. Defendants incurred dilution by tarnishment liability when they used
 18 TST's name, Facebook pages and social media accounts to post statements which harmed its
 19 reputation and standing.
 20

II. Argument

A. Standards for Motion to Dismiss.

21 When considering a motion to dismiss under FRCP 12(b)(6), the court construes the
 22 complaint in the light most favorable to the nonmoving party. *Livid Holdings Ltd. v. Salomon*
Smith Barney, Inc., 416 F.3d 940, 946 (9th Cir. 2005). The court must accept all well-pleaded
 23 allegations of material fact as true and draw all reasonable inferences in favor of the plaintiff. See
 24
 25
 26

1 *Wyler Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). “To survive
 2 a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state
 3 a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct.
 4 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.
 5 Ct. 1955, 167 L. Ed. 2d 929 (2007)); *see also Telesaurus VPC, LLC v. Power*, 623 F.3d 998,
 6 1003 (9th Cir. 2010). “A claim has facial plausibility when the plaintiff pleads factual content
 7 that allows the court to draw the reasonable inference that the defendant is liable for the
 8 misconduct alleged.” *Iqbal*, 556 U.S. at 678.

9
 10 Where the Court dismisses for failure to state a claim, “leave to amend should be granted
 11 unless the court determines that the allegation of other facts consistent with the challenged
 12 pleading could not possibly cure the deficiency.” *Schreiber Distrib. Co. v. Serv-Well Furniture
 13 Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

14
 15 **B. Response to Defendants’ Selective “Facts”.**

16 Defendants’ Motion is predicated on a self-serving statement of “facts” in which “*the
 17 following allegations* are taken as true... .” Dkt. # 27, at 3 (emphasis added). From there,
 18 Defendants go on to include citations to some, but not all, of the allegations of the SAC.
 19 Predictably, Defendants’ version of the “facts” tends to emphasize certain allegations (which are
 20 later derided as “conclusory”) while selectively ignoring many more detailed allegations. This
 21 pattern is repeated throughout the Motion in connection with Defendants’ various arguments.

22
 23 Given the standards applicable to this Motion summarized above, this approach is simply
 24 untenable. *All* of the factual allegation of the SAC are to be afforded a presumption of accuracy
 25 and truth, not just those that Defendants wish to be “taken as true.”

26 //

1 **C. TST Has Properly Pleading a CFAA Claim.**

2 Defendants first contest the CFAA claim. The CFAA creates criminal and civil liability
 3 for “acts of computer trespass by those who are not authorized users or who exceed authorized
 4 use.” *Facebook, Inc. v. Power Ventures, Inc.*, 844 F.3d 1058, 1065 (9th Cir. 2016); *see also Van*
 5 *Buren v. United States*, 2021 U.S. LEXIS 2843, 141 S. Ct. 1648, ____ U.S. ____ (June 3, 2021).
 6
 7 The Court dismissed the CFAA claim, with leave to amend, because TST had not alleged that
 8 Defendants’ actions were done “without authorization.” Order, Dkt. # 20, at p. 6.

9 Following the order of dismissal, undersigned counsel further investigated whether
 10 Defendants abused existing administrative access (which is not actionable under the CFAA), or
 11 whether they had been removed from access (which is). Counsel’s investigation led to the
 12 clarified sequence of events in the SAC: (1) on March 12, Defendants were removed from their
 13 positions (¶ 43); (2) on March 14, Defendants stole the Allies page (¶ 46); (3) shortly later, i.e.
 14 before March 18, the Chapterhead removed Defendants from their administrative access to the
 15 Chapter Facebook page, Twitter, and Google accounts (¶ 49); (4) between March 18 and March
 16 20, Defendants attempted to hack the Twitter and Google accounts (¶¶ 50 and 56); and (5) on
 17 March 20, Johnson hacked the Chapter Facebook page and removed all approved administrators
 18 (¶ 51).

20 Because Defendants made efforts to access administrative functions of the websites after
 21 the Chapterhead had removed their administrative access, Defendants intentionally accessed the
 22 Chapter page and attempted to access the Twitter and Google accounts, all “without
 23 authorization.” 18 U.S.C. § 1030(a)(2); compare SAC, ¶¶ 49-53.

25 Upon accessing the administrative functions, Defendants obtained information about the
 26 approved administrators, removed TST’s approved administrators, replaced TST’s approved

1 administrators with themselves, and began using the administrative functions to create statements
 2 under the false guise that TST's Washington Chapter had been replaced by Defendants. *See SAC*
 3 at ¶¶ 51-57. All of this entails the obtaining of information from any protected computer. 18
 4 U.S.C. § 1030(a)(2)(C). Defendants' failed attempts to do the same to the Twitter and Google
 5 accounts are just as actionable as is their successful attempt on the Chapter page. *See* 18 U.S.C.
 6 § 1030(b).

7 Defendants complain about the addition of the factual detail that the Chapterhead
 8 removed their administrative access before they stole TST's Chapter page and attempted to steal
 9 the Twitter and Google accounts. Motion, Dkt. # 27, at p. 8. This was no reversal of position; it
 10 was the product of further investigation. Prior to the Order of dismissal, counsel errantly thought
 11 it sufficient that Defendants lost the organizational authority to use the administrative functions.
 12 After the Order was entered, Counsel learned that Defendants had more than lost the
 13 organizational authority; they were stripped of their administrative access. By dismissing the
 14 CFAA claim "with leave to amend" (Order, Dkt. # 20, at p. 19), the Court afforded Counsel the
 15 opportunity to investigate whether Defendants had the necessary access credentials to steal the
 16 Chapter page. Had the investigation revealed that Defendants did have administrative access at
 17 the relevant time, the CFAA claim would not have been renewed.

18 Defendants next contest whether TST "explicitly" revoked their access. Motion, Dkt. #
 19 27, at pp. 9-12. This simply ignores the allegations of the complaint. TST "explicitly" revoked
 20 Defendants' access by removing their technological credentials to access the administrative
 21 functions. SAC at ¶ 49.

22 To fuel their argument, Defendants rely on authority which is materially different from
 23 this case. In each of Defendants' cases, the ability to access the computer was still intact. The

1 CFAA requires that the Defendant *not* have the ability to access the particular computer function.
 2 Compare Order, Dkt. # 20, at pp. 5-9 with *Van Buren v. United States, supra*, 2021 U.S. LEXIS,
 3 at *12-13 (June 3, 2021) (“without authorization” means the defendant had no access; “exceeds
 4 authorization” means the defendant had some access, but not to the function at issue). Here, the
 5 SAC clarifies that Defendants did not have the ability to access the particular computer functions.
 6 SAC at ¶ 49.
 7

8 Defendants also contest that TST did not “explicitly revoke” Defendants’ authorization.
 9 Motion, Dkt. # 27, at pp. 12-13. This is flatly wrong. See SAC at ¶¶ 49-68 and Exhibits 5, 7, and
 10 9 (Dkt. # 26-5, 26-7, 26-9). Defendants offer neither authority nor convincing argument to
 11 suggest that, in addition to stripping their technological credentials, TST must also send a
 12 separate notice that informs Defendants that they have lost their technological credentials. Even
 13 if such authority existed, TST met that requirement by demanding the return of the Facebook
 14 page (Exhibits 7 and 9) and threatening litigation if Defendants do not return the page (Exhibit
 15 9). Defendants did not return the Facebook page by the deadline offered. The complaint thus
 16 dispels any doubt about whether Defendants had organizational authority or administrative
 17 access to control the Facebook page.
 18

19 Defendants also take issue with whether the complaint pleads at least \$5,000 in “loss.”
 20 Motion, Dkt. # 27, at pp. 13-15. But this is irrelevant at the pleading stage. See 18 U.S.C. §
 21 1030(g) (“Any person who suffers damage or loss by reason of a violation of this section may
 22 maintain a civil action against the violator.”) The \$5,000 jurisdictional threshold only matters
 23 under 18 U.S.C. § 1030(a)(4) (fraud involving losses of at least \$5,000). But, as the Court pointed
 24 out, TST relies on 18 U.S.C. § 1030(a)(2)(C) (intentionally accessing a computer without
 25

1 authorization or exceeds authorized access, and thereby obtains information from any protected
 2 computer). Order, Dkt. # 20, at p. 5.

3 Alternatively, the complaint adequately pleads a sufficient “loss.” A “loss” is statutorily
 4 defined as “any reasonable cost to any victim, including the cost of responding to an offense,
 5 conducting a damage assessment, and restoring the data, program, system, or information to its
 6 condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages
 7 incurred because of interruption of service.” 18 U.S.C. § 1030(e)(11).

9 Here, the “loss” is (1) the lost ability to communicate to an audience which TST had built
 10 through years of effort (SAC, ¶¶ 51-68); and (2) the 20-30 lost members, as of the original
 11 complaint (¶ 62). As explained in the complaint, there is a dollar value associated with having
 12 an internet audience. SAC at ¶ 77 (the aggregate sum of the social media accounts is \$42,973.92).
 13 Defendants attack that number as “merely conclusory,” but this is a factual proposition which
 14 must be treated as true under the legal standard.

16 As for the lost members, Defendants cite a Pennsylvania District Court case for the
 17 proposition that loss of business relations are outside the purview of the CFAA. Motion, Dkt. #
 18 27, at p. 15 (citing *Eagle v. Morgan*, No. 11-4303, 2011 WL 6739448, at *9 (E.D. Pa., Dec. 22,
 19 2011)). But *Eagle* says just the opposite. The *Eagle* Court found that, “lost revenue incurred
 20 because of an interruption of service” is a “loss.” *Eagle*, 2011 WL 6739448 at *8. TST lost the
 21 20-30 members because Defendants stole TST’s website. SAC at ¶¶ 62 and 78. Because TST
 22 lost the members, TST lost money. That fits precisely within the statutory definition of “loss.”

24 Defendants also take issue with including attorney’s fees in the “loss” analysis. Motion,
 25 Dkt. # 27, at pp. 13-14. The attorney’s fees are included as “consequential damages” within the
 26 text of the statute, 18 U.S.C. § 1030(g); i.e., “Losses that do not flow directly and immediately

1 from an injurious act but that result indirectly from the act.” DAMAGES, Black's Law Dictionary
 2 (11th ed. 2019) (particularly defining “consequential damages”).

3 The Fourth, Sixth, and Eleventh Circuits take the view that the statute provides for two
 4 categories of “loss:” “(1) reasonable costs incurred in connection with such activities as
 5 responding to a violation, assessing the damage done, and restoring the affected data, program
 6 system, or information to its condition prior to the violation; and (2) any revenue lost, cost
 7 incurred, or other consequential damages incurred because of interruption of service.” *Brown*
 8 *Jordan Int'l, Inc. v. Carmicle*, 846 F.3d 1167, 1174 (11th Cir. 2017). This is because the language
 9 of the statute is disjunctive. *See* 18 U.S.C. § 1030(e)(11) (“loss” means “any reasonable cost to
 10 any victim . . . , or other consequential damages.”) (emphasis added).

12 Defendants’ argument speaks to the “any reasonable cost” category of damages, but not
 13 the “consequential damages” category. The attorney’s fees incurred to pursue this litigation fits
 14 within the statutory language “because of interruption of service” because the loss of the Allies
 15 page is an ongoing issue and TST must take corrective action against Defendants to dissuade
 16 other hackers from like conduct. This is a cost incurred in responding to the offense, which is a
 17 “loss.” *See Brown*, 846 F.3d at 1175 n. 2 (11th Cir. 2017) (“The reasonable cost of responding
 18 to the offense—in this case, the unauthorized email access—is not limited to damage to a
 19 computer or network.”)

22 Additionally, and not addressed by Defendants’ Motion, is the “damage” they did to the
 23 website. Defendants accrued liability to TST when they caused “any impairment to the integrity
 24 or availability of data, a program, a system, or information.” 18 U.S.C. § 1030(e)(8) and (g).
 25 Here, Defendants caused impairments to the integrity of the Chapter page by deleting the name
 26 of the website, replacing the correct name with the name of Defendants’ competitor organization

1 and the suffix “Archived Temple Chapter,” modifying the profile picture, and creating various
 2 posts under the false guise that TST’s Washington Chapter had been replaced by Defendants’
 3 competitor organization. SAC at ¶¶ 51-68; Exhibits 2, 6, and 8 (Dkt. # 26-2, 26-6, 26-8).

4 **D. TST Has Properly Pleading a Tortious Interference Claim.**

5 Next, Defendants challenge the tortious interference claim. The Motion challenges three
 6 elements of TST’s tortious interference claim, namely: defendants’ knowledge of a business
 7 relationship; “improper purpose/means;” and damages. *See Dkt. # 27, at 16; Woods View II, LLC*
 8 *v. Kitsap Cty.*, 188 Wn. App. 1, 29-30, 352 P.3d 807, 821 (2015). Defendants repeatedly cite
 9 only a few select paragraphs of the SAC which they claim to be “conclusory,” while ignoring
 10 many other allegations.

12 “The knowledge element is satisfied when the defendant knows of ‘facts giving rise to
 13 the existence of the relationship.’ ” *Woods View II*, 188 Wn. App. at 30 (citing *Calbom v.*
 14 *Knudtzon*, 65 Wn.2d 157, 165, 396 P.2d 148 (1964)). This element does not require specific
 15 knowledge, only awareness of “some kind of business arrangement.” *Topline Equip., Inc. v. Stan*
 16 *Witty Land, Inc.*, 31 Wn. App. 86, 93, 639 P.2d 825, *review denied*, 97 Wn.2d 1015 (1982).
 17 While Defendants cite a single paragraph of the SAC which alleges that they had “subjective
 18 knowledge of the business relationship between Facebook and TST,” (Dkt. #27, at 16 (citing
 19 SAC, ¶85)), they fail to acknowledge several other allegations immediately preceding and
 20 following this paragraph. These additional allegations state: that TST’s business relationships
 21 with Facebook specifically include the Chapter and Allies pages; the nature of economic benefit
 22 to TST of having continuous interactions with current and prospective members via these
 23 platforms; and, most notably, that:

26 *Defendants were aware that the social media accounts had an economic value to TST.*

1 The social media accounts were the primary means for TST to communicate with the
 2 general public and TST's supporters and *Defendants personally used those social*
 3 *media accounts for the purpose of assisting TST in creating the kind of*
 4 *communications that help to foster the kind of relationship which results in charitable*
 5 *donations to support TST's organizational purposes.* By depriving TST of its social
 6 media accounts, Defendants intended to diminish those donations and divert
 7 donations to their competitor organization, provisionally named "The Satanic Temple
 8 2: Electric Boogaloo." Exhibit 5 at p. 4.

9 See SAC, ¶¶ 83, 84, 87 (emphasis added). Especially since no "specific knowledge" of the
 10 business relationship is required to state a claim, these factual allegations – which include that
 11 Defendants knew the economic value to TST of the same Facebook pages they later
 12 misappropriated – more than adequately meet the knowledge element.

13 Defendants continue their "gloss-it-over" approach as they challenge the "improper
 14 purpose/means" element. Having an "improper purpose" is not the exclusive means of satisfying
 15 this element; a "wrongful means" would also satisfy the test. *Pleas v. City of Seattle*, 112 Wn.2d
 16 794, 803-804, 774 P.2d 1158 (1989). This additional wrongfulness does not turn exclusively on
 17 subjective intent, although intent would suffice. "Interference can be 'wrongful' by reason of a
 18 statute or other regulation, or a recognized rule of common law, or an established standard of
 19 trade or profession." *Pleas*, 112 Wn.2d, at 804 (citation omitted).

20 Similarly, Defendants hand-wave by claiming TST "merely alleges that 'Defendants
 21 abused TST's social media presence as a channel to publish derogatory messages directly to
 22 TST's intended audience and to falsely suggest that the Washington Chapter was replaced by
 23 Defendants' competitor organization.' " Dkt. #27, at 17 (citing SAC ¶ 88; emphasis added).
 24 Defendants selectively omitted the following sentence of this same paragraph: "The
 25 contemplated and intentional purpose of so doing was to diminish TST's membership and
 26 donation base." SAC, ¶ 88. Defendants fail to mention that TST also alleged that "Defendants

1 intentionally and with an improper motive acted to sever the Washington Chapter's relationships
 2 with Facebook by misappropriating the two websites for the twin goals of harming the
 3 Washington Chapter, and TST at large, and creating a competitor organization." *Id.*, ¶86.
 4 Moreover, TST alleged that Defendants knew of and breached the TST Code of Conduct in
 5 connection with their unauthorized and harmful activities on TST's social media pages. *Id.*, ¶¶34,
 6 39, 40, 47, 52, 55. Together, these allegations establish both improper purpose and wrongful
 7 means.

9 Finally, Defendants argue that "as to the Allies page, TST fails to allege any damages,"
 10 while acknowledging that TST alleged lost membership due to Defendants' conduct. Dkt. # 27,
 11 at 17. TST also alleged that "[a]s a direct and proximate result of Defendants' wrongful conduct,
 12 TST has suffered substantial economic injury and loss of business opportunity and has incurred
 13 attorney's fees and other costs in attempting to remedy the situation." SAC, ¶89. These are all
 14 damages.
 15

16 Washington courts have established that the damages available for tortious interference
 17 include: "(a) the pecuniary loss of the benefits of the contract or the prospective relation; (b)
 18 consequential losses for which the interference is a legal cause; and (c) emotional distress or
 19 actual harm to reputation, if they are reasonably to be expected to result from the interference."
 20 *Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*, 178 Wn. App. 702, 714, 315 P.3d 1143 (2013)
 21 (citing Restatement (Second) of Torts § 774A (1965)).
 22

23 In addition to the economic injuries cited above, TST also alleges reputational damages:
 24 "TST has incurred, and continues to incur, reputation losses from the misappropriation of its
 25 Facebook pages. These reputation losses are quantifiable in monetary terms, but are irreparable
 26 by money damages alone." SAC, ¶80. Such damages are clearly recoverable on a tortious

1 interference claim. *See Gregg Roofing*, 178 Wn. App., at 714-715 (citing *Island Air, Inc. v.*
 2 *LaBar*, 18 Wn. App. 129, 145, 566 P.2d 972 (1977)).

3 Finally, Defendants cite no legal authority which would require – at the pleadings stage
 4 – that TST segregate or itemize its claimed damages by source, or to provide a specific
 5 accounting in the operative complaint. To the contrary, this Court has denied motions to dismiss
 6 similar claims which alleged damages categorically rather than in precise monetary terms. *See,*
 7 *e.g.*, *Kische USA, LLC v. Simsek*, 2016 U.S. Dist. LEXIS 191172, *27 (W.D. Wash. June 29,
 8 2016) (“[] Defendants direct the court to no authority for their position that a plaintiff must plead
 9 specifically how and to what extent it was damaged by the interference, and again, the court
 10 rejects [] Defendants' argument. ...Kische has plausibly pleaded that loss of its business
 11 relationships with suppliers and major retail clients. At this stage of proceedings, the court can
 12 reasonably infer that Kische has sustained damages from the alleged interference.”) (alteration
 13 supplied); *Putz v. Golden*, 2010 U.S. Dist. LEXIS 129411, *49-50 (W.D. Wash. Dec. 7, 2010)
 14 (“Plaintiffs have alleged that the Goldens' ‘intentional interference with Plaintiffs' rental
 15 business expectations,’ has resulted in ‘lost rental profits, . . . emotional damages,’ and
 16 diminution in the value of property value.”). *See also United Energy Workers Healthcare Corp.*
 17 *v. Atl. Home Health Care, LLC*, 2020 U.S. Dist. LEXIS 251287, *27-28 (E.D. Wash. Oct. 8,
 18 2020) (“At the time UEW Healthcare filed its Complaint, six patients had transferred their care
 19 to Haven. As noted above, the loss of patients logically results in the loss of income. Thus, it is
 20 plausible that UEW Healthcare suffered resulting damage from the alleged tortious interference
 21 with a business expectancy. Accordingly, UEW Healthcare has stated a plausible claim against
 22 Haven for tortious interference with a business expectancy with respect to UEW Healthcare's
 23 former patients.”) (citation omitted).

1 **E. TST Has Properly Pleaded Claims for Trespass to Chattels and Conversion.**

2 Defendants next contest the trespass to chattels and conversion claims. Defendants argue
 3 in error that TST's "trespass and conversion claims relating to the Chapter Facebook page must
 4 be dismissed as moot," because TST has regained access to the Chapter page. Dkt. # 27, at 18-
 5 20. While Defendants set forth a rather grandiose recitation of Article III standards (*see ibid.*),
 6 they offer no legal support for the notion that the eventual restoration of the Chapter page operates
 7 as a bar to either (1) recovery of damages for the past deprivation of this page; or (2) prospective
 8 injunctive relief to prevent Defendants from engaging in future similar conduct, both of which
 9 are sought by TST. *See SAC, ¶¶ 4, 89, 91, 99, 100, 105.*

11 This Court has recently described the tort of trespass to chattels as follows:

12 Trespass to chattels "is the intentional interference with a party's personal property
 13 without justification that deprives the owner of possession or use." *Sexton v.
 Brown*, 147 Wash. App. 1005, 2008 WL 4616705, at *5 (Wash. Ct. App. Oct. 20,
 14 2008) (unpublished) (citing Restatement (Second) of Torts § 217 (1965)).⁵ In
 15 order to sustain an action for trespass to chattel, however, there must be "some
 16 actual damage to the chattel." *See W. Keeton, D. Dobbs, R. Keeton, & D. Owen,
 Prosser & Keeton on Law of Torts 87 (5th ed. 1984); see also Restatement
 (Second) of Torts § 218, cmt. e (1965)* ("[O]ne who intentionally intermeddles
 17 with another's chattel is subject to liability only if his intermeddling is harmful to
 18 the possessor's materially valuable interest in the physical condition, quality, or
 19 value of the chattel"); D. Dobbs, P. Hayden, & E. Bublick, *The Law of Torts*
 20 § 60 (2d ed. 2015) ("To establish liability for trespass to chattels, the possessor
 21 must show legally cognizable harm."). Generally, there are three types of
 22 cognizable harms for a trespass to chattels claim: "(1) actual dispossession, which
 23 implies that the plaintiff's access to the chattel is barred or substantially limited
 24 for something more than a few moments; (2) physical harm to the chattel; or (3)
 25 physical harm to the plaintiff or to someone or something in which the plaintiff
 26 had a legal interest." D. Dobbs, P. Hayden, & E. Bublick, *The Law of Torts* § 60
 27 (2d ed. 2015) (citations omitted).

28 *G&G Closed Circuit Events, LLC v. Single, LLC*, 2020 U.S. Dist. LEXIS 181079, *12-13 (W.D.
 29 Wash. Sept. 30, 2020). This Court in *Single, LLC* went on to hold that a one-time unauthorized
 30 broadcast of a televised program on a single day gave rise to liability for trespass to chattels. *See*

1 *id.*, at *13-14. Thus, the fact here that Defendants' interference with the Chapter page has not
 2 continued unabated to date provides no reason to dismiss TST's related claims.

3 In attempting to challenge TST's claims as to the Allies pages and other confidential
 4 business documents¹, Defendants try to recast these claims as "conversion *or trespass* claims
 5 based on a bailee's retention of personal property," Dkt. # 27, at 19 (emphasis added), and seek
 6 to impose an additional requirement that "plaintiff must plead that it demanded the return of the
 7 property and the defendant wrongfully refused." *Ibid.*

9 Contrary to Defendants' argument, if the taking of a chattel is wrongful, no demand for
 10 return of the chattel is necessary to maintain a conversion claim. *City Loan Co. v. State Credit*
 11 *Ass'n*, 5 Wn. App. 560, 563, 490 P.2d 118 (1971).² Here, TST has clearly alleged that
 12 Defendants' interference with the Allies page and TST's confidential and sensitive documents
 13 was "wrongful." See SAC at ¶¶ 4, 20, 22, 38, 59, 88, 89, 91, 94, 95, 100, 105.

15 Further, none of the cases cited by Defendants (which cases are no more recent than 1962)
 16 actually state that this "demand" requirement applies to a trespass to chattels claims claim (as
 17 opposed to a conversion claim). See *Judkins v. Sadler-Mac Neil*, 61 Wn. 2d 1, 5, 376 P.2d 837
 18 (1962); *Shaffer v. Walther*, 38 Wn. 2d 786, 792-93, 232 P.2d 94 (1951). If this were the case,
 19 there would have been no basis for trespass liability as determined by this Court in *Single, LLC,*
 20 *supra*, nor many other modern cases which involve interference with electronic or other
 21 intangible personal property. See SAC at ¶ 96 and cases cited therein. For these reasons, TST
 22 has properly stated claims for trespass to chattels and/or conversion.

24 ¹ The nature of these documents is described in detail in the SAC at ¶¶20, 28, 38 and 59.
 25 ² It is even doubtful that a demand-and-refusal remains a required element for *any* conversion claim, as opposed to
 26 just another way of describing an antiquated legal doctrine. See, e.g., *Burton v. City of Spokane*, 16 Wn. App. 2d
 769, 773, 482 P.3d 968 (2021) ("Conversion involves three elements: (1) willful interference with chattel
 belonging to the plaintiff (2) by either taking or unlawful retention and (3) thereby depriving the owner of
 possession.") (citing *Judkins*, 61 Wn.2d, at 3)

1 **F. TST Has Properly Alleged Claims for Trademark Dilution.**

2 To prevail on a trademark dilution claim under the Trademark Dilution Revision Act
 3 (“TDRA”) of 2006, 15 U.S.C. § 1125(c), “a plaintiff must show that (1) the mark is famous and
 4 distinctive; (2) the defendant is making use of the mark in commerce; (3) the defendant's use
 5 began after the mark became famous; and (4) the defendant's use of the mark is likely to cause
 6 dilution by blurring or dilution by tarnishment.” *Jada Toys, Inc. v. Mattel, Inc.*, 518 F.3d 628,
 7 634 (9th Cir. 2008).³
 8

9 In their Motion, Defendants profess to have no understanding about the alleged factual
 10 basis for their alleged use of TST’s mark, but this is only because they again selectively ignore
 11 numerous allegations of the SAC. In essence, TST alleges that Defendants misappropriated its
 12 name and its Facebook pages in order to form, market and support a competing religious
 13 organization, which was initially planned to be named “The Satanic Temple 2: Electric
 14 Boogaloo” and/or “Satanic Washington – Archived Temple Chapter”. SAC, ¶¶1, 19, 45, 78, 88,
 15 106, 111. Even today, Defendants continue to use TST’s Allies page to promote their competing
 16 organization. *Id.*, ¶32; Exhibit 3 (Dkt. # 26-3). As discussed in more detail below, this conduct
 17 amounts to dilution by blurring and by tarnishment.
 18

19 Defendants argue that “[a]ny noncommercial use of a mark” is not actionable as
 20 trademark dilution.” Dkt. # 27, at 21 (citing *Sporting Times, LLC v. Orion Pictures, Corp.*, 271
 21 F.Supp. 3d 817, 826-27 (W.D. Ky. 2017) (quoting 5 U.S.C. § 1125(c)(3)(C)). Continuing a now-
 22 familiar pattern, Defendants simply ignore the inconvenient allegation of the SAC which states:
 23 “Defendants’ competitor group is also selling merchandise which features Defendants’ derivative
 24 marks and which Defendants are advertising on TST’s Allies page. See generally
 25

26 ³ Defendants do not challenge that TST’s mark is famous and distinctive.

1 https://www.redbubble.com/people/QueerSatanic/shop (last visited April 26, 2012[sic]).” SAC,
 2 ¶117.

3 In the cases cited by Defendants, the plaintiffs and defendants were operating in totally
 4 different markets and/or forms of media. *See, e.g., Sporting Times, LLC*, supra (plaintiff’s mark
 5 was for a youth sports publication; defendants produced a movie); *Mattel, Inc. v. MCA Records*,
 6 296 F.3d 894, 898-899 (9th Cir. 2002) (plaintiff’s mark was for a toy doll; defendants produced
 7 and marketed a song); *Mossack Fonseca & Co., S.A. v. Netflix Inc.*, No. CV 19-9330-CBM-
 8 AS(X), 2020 U.S. Dist. LEXIS 250102, at *1-3 (C.D. Cal. Dec. 23, 2020) (plaintiffs’ mark was
 9 for a law firm logo; defendant made a documentary film) Here, however, Defendants’ newly
 10 formed religious organization competes directly with TST – for attention, for followers, for
 11 memberships, and ultimately, for monetary donations and merchandise sales. This alleged
 12 conduct is purely commercial and is not subject to First Amendment protection.
 13

14 **1. Blurring.**

15 Defendants’ use of the mark is likely to cause dilution by blurring. Blurring occurs when
 16 a defendant uses a plaintiff’s trademark to identify the defendant’s goods or services, creating
 17 the possibility that the mark will lose its ability to serve as a unique identifier of the plaintiff’s
 18 product. *Horphag Rsch. Ltd. v. Garcia*, 475 F.3d 1029, 1037 (9th Cir. 2007). This typically
 19 involves a fact-intensive inquiry. *Id.* at 1036.

20 The point of dilution law is to protect the owner’s investment in his mark. *Nissan Motor*
 21 *Co. v. Nissan Computer Corp.*, 378 F.3d 1002, 1012 (9th Cir. 2004). This is why it is actionable
 22 for a store to call itself KODAK Pianos, as well as KODAK. *Id.* Both uses have a tendency to
 23 blur the distinctiveness of the mark. *Id.*

1 Here, Defendants are using TST’s trademark (the website formerly named “TST WA
 2 Allies,” Exhibit 3 (Dkt. # 26-3)) to advertise the sale of its competitor merchandise. SAC at ¶
 3 117; *see also* <https://www.redbubble.com/people/QueerSatanic/shop> (last visited June 28, 2021).
 4 Defendants respond with an argument that the SAC inadequately details how their competitor
 5 merchandise is derivative of TST’s trademarks. Motion, Dkt. # 27, at p. 24. This misses the
 6 issue. The issue is that Defendants are using a website which bears TST’s trademark to advertise
 7 the sale of competing goods and services. Defendants are free to sell competing merchandise
 8 and services, they just cannot misappropriate TST’s goodwill to do so. TST has adequately
 9 pleaded a claim for dilution by blurring.

10 **2. Tarnishment.**

11 “The TDRA defines dilution by tarnishment as an ‘association arising from the similarity
 12 between a mark or trade name and a famous mark that harms the reputation of the famous mark.’
 13 ” *Nordstrom, Inc. v. Nomorerack Retail Group, Inc.*, 2013 U.S. Dist. LEXIS 41810, *29 (W.D.
 14 Wash. March 25, 2013) (quoting 15 U.S.C. § 1125(c)(2)(C)). “Thus the inquiry is twofold,
 15 whether there is similarity between the marks at issue, and whether there is harm to the famous
 16 mark’s reputation.” *Ibid.*

17 When Congress enacted the TDRA, it replaced the FTDA with a more detailed statute,
 18 notably providing relief for “likely” and not “actual” dilution, as well as explicitly defining
 19 “blurring” and “tarnishment.” *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 633 F.3d
 20 1158, 1165-66 (9th Cir. 2011). Under the new “likelihood of dilution” standard, the Ninth Circuit
 21 ruled that in the blurring context, the plain meaning of the TDRA no longer requires a plaintiff
 22 to “establish that the junior mark is identical, nearly identical or substantially similar to the senior
 23 mark.” *Id.* at 1172. This Court has held that the same standard applies to tarnishment. *Nordstrom*,

1 *Inc.*, 2013 U.S. Dist. LEXIS 41810 *29-32.

2 Here, whatever degree of similarity is required, the standard is met since Defendants have
3 continued to utilize TST's Allies page for their own purposes. The website URL remains the
4 same as ever; presumably any Facebook user seeking to locate TST's page will be directed to the
5 misappropriated site unless and until Defendants relinquish administrative control over it.
6

7 As to the likelihood of harm prong, this Court has explained as follows:

8 This last prong focuses on whether the use of the junior mark "harms the
9 reputation of the famous mark." 15 U.S.C. § 1125(c)(2)(C). Courts have found
10 that harm "generally arises when the plaintiff's trademark is linked to products of
11 shoddy quality, or is portrayed in an unwholesome or unsavory context likely to
12 evoke unflattering thoughts about the owner's product." *Tiffany (NJ) Inc. v. eBay*
13 *Inc.*, 600 F.3d 93, 111 (2d Cir. 2010) (quoting *Deere & Co. v. MTD Prods., Inc.*,
14 41 F.3d 39, 43 (2d Cir. 1994)). For example, there is some consensus among
15 courts across jurisdictions that a famous mark is tarnished when it is semantically
16 associated with a new mark used to sell sex-related products. *See V Secret*
17 *Catalogue, Inc. v. Moseley*, 605 F.3d 382, 388 (6th Cir. 2010). A trademark may
18 also be diluted by tarnishment if the mark loses its ability to serve as a
19 "wholesome identifier" of the plaintiff's product. *Starbucks Corp. v. Wolfe's*
20 *Borough Coffee, Inc.*, 588 F.3d 97, 110 (2d Cir. 2009) (citing *Hormel Foods Corp.*
21 *v. Jim Henson Prods., Inc.*, 73 F.3d 497, 507 (2d Cir. 1996)). The Second Circuit
22 found that the relevant inquiry is how the junior mark's product affects the positive
23 impressions about the famous mark's product, and not whether a consumer simply
24 associates a negative-sounding junior mark with the famous mark. *Starbucks*, 588
25 F.3d at 110.

26 *Nordstrom, Inc.*, 2013 U.S. Dist. LEXIS 41810 *34-35.

27 In this connection, TST has alleged in detail how Defendants have harmed TST's
28 reputation in the eyes of its membership and the general public by using TST's own web pages
29 and social media accounts to falsely associate TST with "ableism, misogyny, racism, fascism,
30 transphobia, and the endorsement of police brutality," as well as political extremist organizations.
31 SAC, ¶¶112-116. As such, TST has amply alleged dilution by tarnishment.
32

III. Conclusion

For the reasons discussed above, TST respectfully requests that this Court deny Defendants' Motion in its entirety. In the event that the Court finds any pleading deficiencies, it should give TST leave to amend its SAC to cure them.

Respectfully submitted this 28th day of June, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of June, 2020, I electronically filed PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties of record.

Dated at Seattle, Washington, the 28th day of June, 2020.

By: /s/ Benjamin Justus
Benjamin Justus